Community Issues in Criminal Justice

Utilizing Game Theory to Inform Justice Policy Development

Our justice system, both civil and criminal is, first and foremost, an *adversarial* system. That is, our justice system is premised on the principle that, in essence, **justice for all is best served when all parties to a matter are represented by legal counsel whose duty it is to vigorously advance their client's position, within the bounds of proper practice and legal procedure**. In this adversarial system there can be only 1 outcome - there is a **winner**, and a **loser**.

The ideal of the civil system is that the loss of the losing party is transferred to the winner. Thus for example, the award to the plaintiff for damages suffered as a result of the negligence of the defendant, in theory, "makes good" for that damage, and is paid by the defendant to the plaintiff.

This is the essence of a *zero-sum game*, as such is contemplated in game theory. The sum of the **win** for the victor plus the **loss** for the loser, provides an **outcome** that equals **0**. Thus for example, if the win is $100, the loss on the other side will equal -$100, and the result of $100 + -$100 = 0.

The underlying theory of the zero-sum game is that each participant will strive to maximize their winnings, and minimize their losses, and will make decisions each time it is their "turn" that are intended to achieve that outcome.

But of course the reality, certainly in civil litigation, couldn't be further from the theory. In the vast majority of civil cases, the matter does not go to trial, where the zero-sum game would be in effect. Rather, by far the most usual outcome of civil and commercial litigation is a negotiated or mediated settlement.

A negotiated or mediated settlement is a *non-zero-sum game*; a game in which the participants can all "win", at least in some sense. A game in which there are no "losers" again, at least in some sense. The **outcome** can be negative, though it is far more often positive, for all the players in the game, but it can never by 0.

The ideal of the criminal justice system, on the other hand, even though adversarial in procedure is not something to which, on the face, game theory can be readily applied. In the trial of the state v. the citizen there are, in a very real sense, no **winners** – there are only **losers**. The victims, the offenders, the community, even the state – nobody *wins*.

But just as with the civil justice system, the *ideal* in the criminal justice system is not what is actually happening and there has been a trend, particularly in the last 25 years, to effectively transform the criminal justice system into a process very much like the zero-sum game.

In the Spring 2007 Issue of **The Reporter**, we talked about the symbology of "tough on crime", and quoted professor Franklin Zimring, from his book, <u>Three Strikes and You're Out in California: Punishment and Democracy</u>, as:

> *[There is] the . . . assumption that virtually all issues of punishment policy can be reduced to a <u>zero-sum competition</u> between crime victims and criminal offenders. Whether the question is prison terms for burglars, registration of sex offenders, or recreational facilities in state prisons, the notion of zero-sum competition asks the voter to decide the issue by choosing between offenders and their victims. The implicit assumption is that anything that is bad for offenders must be beneficial to victims. As a matter of utilitarian reasoning this approach has little merit, but as political rhetoric it is both versatile and appealing. Once every policy question becomes a status competition, the appropriate result is a foregone conclusion. Instead of calculating costs and benefits, all citizens must do is choose sides.*

> *The rhetorical versatility of this conception is quite astonishing. No punishment is too extreme if anything that hurts offenders benefits victims.*
> *. . . .*
> *If the motivation behind public support for enhanced punishment is a symbolic denunciation of criminals and crime, this need to make a symbolic denunciation may not be closely linked to any particular set of outcomes.*

In that Issue, we were quoting Professor Zimring to illustrate the point of the symbology of the whole "tough on crime" agenda. But the other key point that the learned professor makes in this short passage references the transformation of the criminal justice process into a zero-sum game, where the "players" are the victims and the offenders.

Of course, while this "version" of the zero-sum game within the criminal justice system may well be appealing to some, it is nonetheless fallacious in that it is based on false premises.

- **"Hurting" offenders does not produce an outcome that is beneficial to offenders and, by logical extension, does not produce an outcome that is beneficial to the community or the state;**

- **Nor does hurting offenders produce an outcome that is beneficial to victims – the "damage" inflicted on offenders does not, and cannot, "heal" the harm occasioned to the victim.**

The reality is that this is not a zero-sum game, nor even a non-zero-sum game; it is a negative-sum game. That is, "everybody loses".

So, to this point, game theory can help us to better understand the actual outcomes of a retributive criminal justice system, and in this regard help to inform the development of future criminal justice policies with the goal of achieving positive outcomes.

But can it do more? Can it help us to devise criminal justice policies that not just avoid negative outcomes, but actually yield positive outcomes?

If we return to the concept of the non-zero-sum game, where the desired outcome is that all participants in the game come out as winners (at least in some sense), it may well be that this too can prove instructive in the future development of criminal justice policy and procedure.

In the non-zero-sum game, the desired outcome for the participants is not that, at the end of the game, there is one winner, and everyone else loses. Rather, in the non-zero-sum game the desired outcome is that all participants come away from the game having "won" something.

Is there a precedent in the criminal justice system for dealing with a matter in such a way that everyone comes away from the process having "won" something?

Well, yes there is. It's called "Restorative Justice".

The John Howard Society of Alberta has been researching and writing about the strengths of the Restorative Justice (RJ) process for almost 2 decades. During that period, the body of scholarly literature, around the word, has continued to grow, and continues in unanimity that this is a process that is, to stay with our theme, a "non-zero-sum game" – **everyone wins!**

Now of course, it must be acknowledged that whenever acts of social disorder result in harm to others, there is a "loss" – whether monetary, psychological, or emotional; this loss is experienced by victims, by the state, and by the community. And when thinking about the "loss", it must be remembered that a real and significant aspect of losses arising from criminal actions are the costs that arise in responding to those actions.

The fundamental issue however, is not in acknowledging that there are losses that arise from criminal actions; rather it is in considering how those suffering the "loss", be it the victim, the community, or the state, respond to that loss.

That fundamental issue is whether that response is one that increases the overall "loss", or one that mitigates the loss as much as possible in the circumstances.

Should our society's response to criminal acts rest on policies that endeavour to give to a zero-sum game outcome, or on policies that endeavour to give a non-zero-sum game outcome? For every situation, the mathematics of game theory can be applied to provide an indication of which course of action is most likely to result in the losses being mitigated as much as possible. But it takes graduate level mathematicians to devise the algorithms that would be required to do this - so where is the value in considering game theory?

Simply put, while the mathematics will provide a very sophisticated analysis, with a "number" that one can refer to at the end of the process, one doesn't have to know what the actual "number" will be in any given instance. All one has to know is that one approach will consistently provide one kind of outcome, and another approach will consistently provide another kind of outcome.

We don't have to utilize esoteric mathematics to "know" that an outcome that results in *zero + n* is preferable to an outcome that results in *zero -n*. **As the John Howard Society of Alberta has been saying for over 2 decades, and as the continually growing body of scholarly literature** continues to demonstrate, a retributive criminal justice system will, in actual practice invariably result in a *zero –n* outcome. While a criminal justice system based on principals of restorative justice will consistently deliver a *zero +n* outcome – an outcome where all concerned will come away from the process feeling some measure of having *gained* something from it.

NOTICE OF AMENDMENT TO JOHN HOWARD SOCIETY OF ALBERTA GOVERNANCE POLICIES

TAKE NOTICE THAT at the 2008 Annual General Meeting of the Society, a **Motion** will be presented to the membership present at the Meeting, **that The John Howard Society of Alberta Board Policy II.B. [Executive Limitations – Financial Planning] be amended as follows**:

Policy II.B., which presently reads

> *With respect to budgeting, the ED shall not deviate significantly from the Board's stated Ends policies, or jeopardize the fiscal integrity of JHSA.*

Shall be amended to read

> *With respect to budgeting, the ED shall not deviate materially from the Board's stated Ends policies, or jeopardize the fiscal integrity of JHSA.*

Rationale: Policy II.B. sets the limits of Executive actions concerning the financial planning of the Society, and is directed at acts the Executive Director **shall not** take without prior Board approval. The proposed amendment to this policy replaces the term "significantly", which is somewhat vague and subjective, with the term "materially", which is specifically defined in Generally Accepted Accounting Practices [GAAP].

The Board recommends that the membership approve this proposed amendment to the Board Policy.

The John Howard Society of Alberta
Annual General Meeting 2008

The Society's Annual General Meeting will be held Saturday, June 14th, 2008
at the Coast Edmonton Plaza Hotel located at:
10155-105 Street, Edmonton, AB
from 1:30 p.m. to 2:30 p.m.

We welcome everyone to attend.
Hope to see you there!

RSVP Bev Tweedle @ (780) 423-4878 by June 6th, 2008

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SOCIETY OF ALBERTA**

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**The John Howard
Society of Alberta**
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The Reporter, a publication of the John Howard Society of Alberta, is distributed free of charge to a wide audience of citizens, educators, agencies, and criminal justice staff. Our goal is to provide information and commentary on timely criminal justice issues. We welcome and encourage your feedback on The Reporter.

The John Howard Society of Alberta is an agency composed of citizens in Alberta who are interested in criminal justice reform and preventing crime in our communities. We recognize that dealing with crime is the responsibility of the community as well as public agencies.

We gratefully accept donations to help offset the costs of our efforts in criminal justice reform and crime prevention. Donations are income tax deductible.

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